IN THE UNITED STATES BANKRUPTCY COURT

FOR THE

SOUTHERN DISTRICT OF GEORGIA
Savannah Division

IN RE:	)	Chapter 7 Case
	)	Number 92-42515
MARVIN SAMUEL STRODE	)	
	)	
Debtor	)	
	)	
SLOAN ELECTRIC CO., INC.	)	
	)	
Movant	)	
	)	
vs.	)	Adversary Proceeding
	)	Number 93-4041
MARVIN SAMUEL STRODE	)	
	)	
Respondent	)	

ORDER

By motion, Sloan Electric Company, Inc. ("Sloan Electric") seeks relief from the automatic stay of 11 U.S.C. § 362(a) in order to proceed in superior court in an action presently pending against debtor and others. The matter having come on for hearing and having considered the evidence presented and the briefs submitted by the parties, I enter the following order denying the requested relief.

In early December 1992 Sloan Electric filed suit in Chatham County Superior Court, Civil Action No. x92-4006-B, against debtor and six others. The suit alleged generally that in September

1990 DeWitt-Strode Insurance Services, Inc. ("DeWitt-Strode") was given a check for $25,466.00 by Clyde K. Hull, Jr. ("Hull"), an agent of DeWitt-Strode, on behalf of Sloan Electric, that said funds were to be held pending investment in a pension plan, and that the funds were subsequently spent without direction or authority of Sloan Electric.[1] At the time of the events in question, Marvin Samuel Strode ("debtor") was an officer of DeWitt-Strode. Immediately subsequent to the filing of the superior court action, on December 14, 1992 debtor filed the above captioned chapter 7 case. Although the automatic stay of 11 U.S.C. § 362(a) prohibited Sloan Electric from continuing the superior court action against debtor, it continues as to the six other defendants.

On March 10, 1993 Sloan Electric filed an adversary proceeding in this court against debtor making the same basic allegations as the superior court action. In its complaint Sloan Electric alleges that debtor obtained and used the funds under false pretenses or actual fraud, in that he knew or should have known that the funds deposited were to be held in trust. Sloan Electric also contends that as a result of the theft and misuse of the funds, debtor is liable for larceny, fraud or defalcation while acting in a fiduciary capacity. Debtor denies Sloan Electric's charges. As

[1]The movant did not introduced the complaint filed in Chatham County Superior Court into evidence in this court; therefore, I am unable to determine the exact allegations listed in that complaint. The allegations presented here are from the representations made by movant's counsel in his post-hearing brief.

part of the adversary proceeding, in addition to a determination as to debtor's liability for the funds in question, Sloan Electric also seeks to have any judgment against debtor determined to be nondischargeable pursuant to 11 U.S.C. § 523(a).[2] On April 30, 1993 the Honorable Lamar W. Davis, Jr., Chief United States Bankruptcy Judge entered a scheduling order giving the parties sixty days to complete discovery.[3] On July 9, 1993 Sloan Electric filed the present motion, alleging for cause grounds for relief from stay, seeking to pursue debtor in the presently pending action in superior court on the issue of debtor's liability. Debtor opposes the motion, seeking to have the issues of liability and dischargeability litigated in one proceeding in this court. At hearing both parties

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[2]Sloan Electric's complaint shows that it asserts both §§ 523(a)(2)(A) and (a)(4) grounds for nondischargeability of any debt established in its litigation against debtor. Those sections provide:

> (a) A discharge under section 727, 1141, [,] 1228[a] 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt-
>
> (2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained, by-
>
> (A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition; . . .
>
> (4) for fraud or defalcation while acting in a fiduciary capacity, embezzlement, or larceny;

[3]Judge Davis entered an order of recusal and assigned me this adversary proceeding on May 5, 1993.

announced their readiness to proceed with trial of the adversary. The action in superior court remains in the discovery stage.

The joint pretrial stipulation filed in this case lists the following relevant facts as undisputed. On September 14, 1990 DeWitt-Strode was given a check by Hull, drawn on the account of Sloan Electric in the amount of $25,466.00. Clyde Hull had a responsibility to Sloan Electric to invest these funds for and on behalf of Sloan Electric's pension plan. DeWitt-Strode accepted and used the funds in the normal course of its business. Almost all other facts are disputed.

Debtor contends that the check from Sloan Electric was a loan which Hull represented could be used, but would have to be repaid in one to one and one-half months. According to debtor, after use of the funds for two months, he questioned Hull about when the funds would need to be repaid and was informed by Hull that he had taken care of the Sloan Electric loan and that the funds would be considered part of his then present attempt to buy into DeWitt-Strode. Debtor contends that in February 1991 Hull decided not to "buy-in" and that Hull demanded DeWitt-Strode pay him $39,000.00, an amount which included the Sloan Electric funds. According to debtor it was not until August 1992 that Hull informed him that the Sloan Electric pension plan had been audited and that the money needed to be repaid with interest.

Sloan Electric contends that the debtor and Hull are

opposed.[4] According to Sloan Electric debtor contends he knew the funds were to be held as pension funds, but that Hull authorized use of the funds as a "short term loan" to the company; but Hull contends that debtor knew the funds were pension monies, that no authorization to use the funds was given, and that when he learned the funds had been spent he endeavored to have debtor "put the money back."

Upon the filing of a bankruptcy petition, the Bankruptcy Code imposes an automatic stay against

> the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title or to recover a claim against the debtor that arose before the commencement of the case under this title.

11 U.S.C. § 362(a)(1). As Sloan Electric's action against debtor and others was pending in superior court at the time of debtor's filing, the automatic stay applies to that action as against the debtor.

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay--
>
> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest.

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[4]Along with debtor, Hull is a defendant in the superior court action.

11 U.S.C. § 362(d)(1).

"Cause" under § 362(d)(1) is not defined in the Bankruptcy Code and is determined on a case-by-case basis. In re Tucson Estates, Inc., 912 F.2d 1162, 1166 (9th Cir. 1990). When a party in interest alleges "for cause" grounds for relief from stay, once the movant has established prima facie there is cause for relief from stay, the debtor bears the burden of proof by a preponderance of the evidence that "cause" does not exist, 11 U.S.C. § 362(g); In re Pioneer Commercial Funding Corp., 114 B.R. 45, 47 (Bankr. S.D.N.Y. 1990).

In considering whether to modify the automatic stay to permit continuance of an action pending in another forum against a debtor in bankruptcy, I must consider whether

> (a) [a]ny 'great prejudice' to either the bankrupt estate or the debtor will result from continuation of a civil suit,
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> (b) the hardship to the [non-bankrupt] party by maintenance of the stay considerably outweighs the hardship of the debtor, and
>
> (c) the creditor has a probability of prevailing on the merits of the case.

In re Clayton, Chapter 12 case no. 91-60141, slip op. at 7 (Bankr. S.D. Ga. February 14, 1992); In re Benbo of Georgia, Inc., Chapter 7 case no. 91-10931, slip op. at 5-6 (Bankr. S.D. Ga. March 2, 1992). See also, In re Pro Football Weekly, Inc., 60 B.R. 824, 826 (N.D. Ill. 1986); In re Fernstrom Storage and Van Co., 938 F.2d 731 (7th Cir. 1991); In re Salisbury, 123 B.R. 913 (S.D. Ala. 1990). Considering these factors denial of relief from the stay is

appropriate.

Sloan Electric contends that it will be greatly prejudiced and put to unreasonable hardship if it is required to try this matter in two forums. Additionally, it contends that judicial economy will be served if it is allowed to pursue its action against the debtor in the superior court to resolve all its claims against all defendants in one forum. Sloan Electric contends that not only will the debtor's liability be established in the superior court action, but also through the application of collateral estoppel, the nondischargeability of that debt determined. Whether collateral estoppel could be asserted by Sloan Electric against the debtor on the dischargeability issue cannot be resolved at this point. While the doctrine of collateral estoppel is applicable in dischargeability proceedings pursuant to §523(a) when there is a final judgment from a state court proceeding, Grogan v. Garner, 489 U.S. 279, 285 n. 11, 111 S.Ct. 654, 658 n. 11 (1991), the bankruptcy court has exclusive jurisdiction to determine whether a debt is dischargeable on §523(a)(2)(A) and (a)(4) grounds as alleged by Sloan Electric. 11 U.S.C. §523(c)(1); see In re: Piercy, 140 B.R. 108, 113 (Bankr. D. Md. 1992). Thus, even if the superior court were to establish debtor's liability, the dischargeability issue would still be determined by this court in this forum. Such a determination would require me to look behind the state court judgment, examine the facts and decide which elements of the claim for nondischargeability had been pled in the superior court, which

were actually litigated, and whether their determination was critical and necessary to the superior court judgment. See In re: Marks, 139 B.R. 548, 550 (Bankr. M. Fl. 1992). At this point, as it is impossible to determine the preclusive effect a superior court judgment against debtor might have, if any, I cannot conclude that judicial economy will be served if relief from stay were granted. In re: Borbridge, 81 B.R. 332, 337 (Bankr. E.D. Penn. 1988). The superior court action will result in only a partial resolution of the issues now before this court, liability, and may result in needless relitigation of the issues in this forum. In re: Curtis, 40 B.R. 795, 804 (Bankr. D. Utah 1984).

While a denial of relief from stay may result in Sloan Electric incurring some additional expense in trying the matter in this court as to debtor and in the superior court as to other six defendants, the additional expense is minimal because were stay relief granted, the issue of dischargeability remains for trial in this forum. The financial hardship to the debtor would be considerable if relief from stay were granted. Debtor would be required to litigate the matter of liability in the superior court and then again on the dischargeability issue in this court if liability is found. A single trial in this forum as to debtor's liability and dischargeability if necessary would eliminate the debtor's double litigation expense.

Sloan Electric also contends that as the debtor and Hull have taken irreconcilable positions regarding the nature of the

transaction between DeWitt-Strode and Sloan Electric, to require separate trials on the issue of liability would expose Sloan Electric to the inequitable possibility of inconsistent verdicts which could jeopardize Sloan Electric's undisputed right to a recovery. The fact that two defendants contend that the other is responsible for the loss suffered by plaintiff standing alone it is not a basis to grant relief from stay. The positions may be opposite, but the testimony of the witnesses in both proceedings is assumed to be the same. If the contrary occurs, the party may use the prior testimony to impeach the witness.

Sloan Electric contends that it should not be precluded from obtaining relief from stay where debtor brought the situation upon himself by his own misdeeds and misconduct. I find this irrelevant to my determination of the present motion. Sloan Electric does not have an undisputed right to recover. Whether the debtor's conduct is such as to give rise to liability is precisely the determination to be made at trial either here or in the superior court.

As to the likelihood of success on the merits of its complaint, although Sloan Electric has set forth a cause of action that is sufficient to overcome a motion for judgment on the pleadings, there is insufficient evidence before me to make an accurate determination in that regard.

In this case a prompt resolution of this cause of action against this debtor can be obtained in this forum. Judicial Economy

favors the resolution of the issue of liability, and if necessary, dischargeability in one trial in this court. The parties have announced ready to try this matter in this forum. The superior court action remains in the discovery stage and resolution of the issues in that court could take a considerable time. By denying relief from stay, both the issues of liability and dischargeability can be resolved quickly in the pending adversary. A prompt resolution of this dispute is in the best interest of all parties.

Accordingly, it is hereby ORDERED that the motion of Sloan Electric for relief from the stay of 11 U.S.C. §362(a) is denied.

JOHN S. DALIS
UNITED STATES BANKRUPTCY JUDGE

Dated at Augusta, Georgia
this 29th day of December, 1993.